

DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

CA06-430

DECEMBER 6, 2006

TRACEY MORETON TROUT

APPELLANT

V.

DANIEL JESS MORETON

APPELLEE

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. DR98-1605-4]

HON. JOHN RUSSELL SCOTT,
CIRCUIT JUDGE

AFFIRMED

Tracey Moreton Trout appeals from an order of the Benton County Circuit Court authorizing Daniel Jess Moreton to relocate to Colorado with the parties' three minor children, Emily, Andrew, and Nathan, who are fourteen, twelve, and ten, respectively. On appeal, Trout argues that the trial court should have denied the petition to relocate. We affirm.

Moreton was awarded custody of the children in the parties' April 14, 1999, divorce decree. Both parents were awarded "half of the children's free time," which was defined in the decree as "weekends, holidays, and summer vacation." The parties returned to court several times, resulting in multiple findings of contempt against Trout for failing to pay the \$46 per week child support for several years. Trout also sought to change custody in 2002. In November 16, 2005, Moreton filed a petition requesting that he be allowed to relocate to

Colorado Springs, Colorado, with the parties' three minor children. Trout counter-petitioned for change of custody and moved to have Moreton found in contempt for reasons that were unfounded and that are not germane to this appeal.

Martin Faitak, a licensed clinical psychologist, testified that he had been counseling the Moreton children since 2001, mostly on an "as needed basis." He opined that the move to Colorado would involve "some significant changes in friendships and schools and support systems," which he believed would cause the children "some harm," but he did not believe that the change would be detrimental "in the long run." He noted that the children were aware of the disadvantages of moving and were "concerned about losing the relationship with their mother and concerned about their friendships, but they felt overall that the move would be better than staying." Regarding whether the children would require counseling to adapt to the move, Dr. Faitak stated that the children would need counseling only "if they have a reaction once they get there." He noted that the children have been in counseling for four years and that they were "burned out" and that there is "a disadvantage of putting them in counseling unless it's really needed."

Regarding each child individually, Dr. Faitak opined that Emily will lose stability in her life, lose "relationships with her friends," and lose the relationship with her mother, but he believed that these disadvantages could be overcome. He noted that at first Emily did not want to move, but upon further reflection decided it would be "okay." Dr. Faitak testified that Drew was also "okay" with the move. He noted that Drew had expressed concern about

being “coerced” by his mother to say that he wanted to live with her. As with Emily, Dr. Faitak noted that Drew would lose friendships, and leave behind sports teams and the choir that he sang in, but he felt that Drew could “overcome it.” Finally, regarding Nathan, Dr. Faitak noted that Nathan had expressed fear of his mother and her new husband, felt he was being “ostracized and punished excessively” by her, and stated that he wanted to avoid visiting her. Dr. Faitak stated, however, that therapy sessions involving Nathan and his mother had improved their relationship. He stated that Nathan says he “doesn’t care about the move.” Dr. Faitak opined that Nathan would be affected most by the move, but that any psychological detriment would be temporary. At the close of his testimony, he stated that he believed that it was best to keep the children together and with Moreton.

Moreton testified that he presently worked for Moser Corporation in Rogers, where he designed and sold office furniture. He stated that in his current job, he had a “draw” of \$800 per week, but would make “right around \$60,000” for the year. In his new job, with OfficeScapes, he would have a draw of \$1,000 per week plus commission. He stated that his territory in Colorado would be a larger area than his current territory in Rogers and that it was undergoing “tremendous growth.” His first-year income projection in Colorado was \$70,000. Moreton noted that OfficeScapes offers profit sharing, while Moser does not, although both Moser and his new company have 401(k) plans. He also noted that OfficeScapes, unlike Moser, offers orthodontics coverage, which would benefit two of the children.

Moreton made an offer on a house in Colorado in the amount of \$239,000. The family's current residence in Arkansas was under contract for \$187,000. He expected that his house payment in Colorado would be \$1,250 to \$1,300 per month as opposed to his current payment of \$1,027. Moreton claimed that he "researched" the school districts in Colorado and found them to be "very high quality." The house that he has made an offer on is located close to the children's schools.

Moreton denied wanting to move simply to get away from Trout. He testified that he had started building a new home in Bella Vista before he was offered the job in Colorado. He denied that he had ever "frustrated" the children's visitation with Trout. He also stated that he had always kept Trout informed of the children's medical needs. Moreton also stated that he had accommodated Trout's request for additional visitation "three or four different times."

On cross-examination, Moreton admitted that he and his current wife, Karen, had arguments that resulted in pushing each other. He also admitted that they had threatened each other with divorce and that Karen had left the home for one night pursuant to their last argument. Moreton noted, however, that the children were in bed during these arguments and that they did not escalate to the point where police were called or either party suffered any type of injury. He also stated that he and Karen had sought marriage counseling. Moreton refused to concede that Trout had an "appropriate" home for the children because Emily and Nathan were forced to share a bedroom.

Dr. Faitak, who had remained in the courtroom, was called by Trout. He expressed concern over the apparent instability in Moreton's relationship and the fact that the children had not told him about it. He conceded, however, that it was possible that the children had not reported it to him because the disagreements had occurred outside of the sight the children, as Moreton had stated.

Karen Moreton testified that she worked part-time cleaning houses. She stated that she has two children, Emma and Alex, ages thirteen and eleven respectively, that lived with her. She stated that they worked through "blended family issues." Karen attributed a major part of the family stress to the fact that "every year we've been in court, and [her children] kind of get dragged in the middle of that with the siblings." She also had found it stressful to work full-time and take care of five children, which she attempted for a time. Karen confirmed that she and her husband had a few altercations that resulted in Moreton "shoving" her, but she stated that "I don't feel like I would ever divorce Dan." She stated that she did not believe that the children were aware that she and Moreton had quarreled.

Tracy Trout testified that the change in circumstances that she was relying on was Moreton's proposed move to Colorado. She also stated that she was "concerned about Dan and Karen's relationship." She admitted that Emily and Nathan had to share a bedroom when they stayed at her house, but stated that she planned to build a bigger house at a presently undetermined location. Tracy's husband Jason Trout testified that their two-and-a-half-year

marriage was “very good.” He stated that he would love to have the children live with them full time, and if it happens, they plan on looking at a “little bit bigger of a house.”

At the close of the testimony, the trial judge granted Moreton’s request to relocate. He referenced the supreme court’s decision in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), and made specific findings in accordance with the *Hollandsworth* blueprint. He found that Moreton’s reason for relocation “is valid, appropriate, and is not to curtail the relationship of Mrs. Trout with the parties’ children”; the educational, health, and leisure opportunities available in Colorado Springs are substantially the same as Benton County; and that based on the testimony of Dr. Faitak, the children were not opposed to the move. The trial judge noted that he heard no evidence concerning extended family relationships, so he discounted that as a factor. Finally, he made adjustments to Trout’s visitation schedule to give her nine weeks of summer visitation and extended time with the children over the Thanksgiving and Christmas holidays on alternating years. Moreton was ordered to bear the cost of flying the children to these visits, or reimbursing Trout for driving to a meeting point in Salinas, Kansas, if they agreed to that mode of transportation. He also allowed Trout visitation in Colorado at any time, upon seventy-two hours notice to Moreton. Trout’s petition for change of custody and motion for contempt were denied.

On appeal, Trout argues that we should reverse and remand this case for further proceedings. She asserts that she “has sustained her burden of proof,” which she contends is required by *Hollandsworth v. Knyzewski*, because Moreton’s reason for relocation “shows

no real advantage financially”; the testimony of Dr. Faitak “clearly” shows that the relocation will have “an adverse and detrimental effect on the children”; there was “sparse to no evidence” presented by Moreton regarding educational, health, and leisure opportunities available in Colorado; mental-health treatment of the parties’ children was “ongoing although tapering off”; visitation and communication schedule for the non-custodial parent will be “minimal and frustrated” by the relocation; and “the preference of the children based on their age and maturity falls in favor of non-relocation.” Regarding this latter point, Trout specifically points to Dr. Faitak’s testimony, in which she claims he stated that “the children were happy and satisfied here in Arkansas and told them they did not want to move.” We find no merit to this argument.

In child-custody cases, the primary consideration is the welfare and best interests of the child involved; all other considerations are secondary. *Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). We review the case de novo, but we will not reverse a trial judge’s findings in this regard unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* Because the question of whether the trial court’s findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child’s best interests. *Id.*

In *Hollandsworth*, the supreme court pronounced a presumption in favor of relocation for custodial parents with primary custody and stated that the custodial parent no longer has the obligation to prove a real advantage to herself or himself and to the children in relocating. The court further held that the noncustodial parent should have the burden to rebut the relocation presumption. *Id.* In addition, the supreme court established an analytical framework for trial courts to evaluate requests by a custodial parent to relocate out-of-state:

The polestar in making a relocation determination is the best interest of the child, and the court should take into consideration the following matters: (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in which the custodial parent and children will relocate; (3) visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; and, (5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.

Id. at 485, 109 S.W.3d at 663-64.

We believe that Trout has misinterpreted *Hollandsworth*. The supreme court in *Hollandsworth* put the burden of rebutting the presumption in favor of relocation on the party opposing the move. Moreton was not, as Trout suggests, required to show any financial advantage. Instead, Trout was required to establish that the move was not in the best interest of the children. Nonetheless, Moreton articulated the financial expectations that he had obtained before deciding to make his career move. According to his testimony, the move was financially advantageous, and Moreton's testimony was unrebutted by Trout. Likewise,

Trout also mischaracterizes Dr. Faitak's testimony in that while he acknowledged that there were some disadvantages associated with the move, he believed that the adverse effect would be short-lived and would be overcome by the children. Moreover, contrary to Trout's assertions, the children did not oppose the move. We are mindful that Trout expressed concern that the move would diminish her contact with her children; however, we note that the expanded summer and holiday visitation provides Trout with meaningful visitation, which is all that *Hollandsworth* and its progeny require. See *Benedix v. Romeo*, 94 Ark. App. 412, ___ S.W.3d ___ (2006). Given the lack of definitive evidence that the move was contrary to the best interest of the children, we cannot say that the trial court clearly erred in allowing the move.

Affirmed.

BIRD and GRIFFEN, JJ., agree.